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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 131

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Respondents.

BRIEF OF RESPONDENTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR. AND FRED M. KIRBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DENIAL OF PETITIONERS' APPLICATION TO INTERVENE

WALTER R. MANSFIELD,
Attorney for Respondents Allan P. Kirby, Charles T. Ireland, Jr. and Fred M. Kirby,
Two Wall Street,
New York, New York 10005.

WALTER L. STRATTON,
BEN VINAR,
JOHN J. McCANN,
DONOVAN LEISURE NEWTON & IRVINE
Of Counsel

May 24, 1965.

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IN THE

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OCTOBER TERM—1964

No. 1157

MARGARET L. HOLT and KATHLEEN L. McMAHON, individually and on behalf of all other shareholders of Alleghany Corporation similarly situated,

Petitioners,

v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR. and FRED M. KIRBY,

Respondents.

BRIEF OF RESPONDENTS ALLAN P. KIRBY, CHARLES T. IRELAND, JR. AND FRED M. KIRBY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DENIAL OF PETITIONERS' APPLICATION TO INTERVENE

This brief is submitted on behalf of respondents Allan P. Kirby, Charles T. Ireland, Jr. and Fred M. Kirby in opposition to the petition for a writ of certiorari to review the affirmation by the Court of Appeals for the Second Circuit of a decision by the District Court for the Southern District of New York (Ryan, Ch. J.) denying petitioners' application for leave to intervene.

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the denial of petitioners' application to intervene where both the district court and the Court of Appeals found that their interests herein as stockholders have been adequately represented by a majority of Alleghany's board, which is not under respondents' domination and has acted in good faith for reasons believed to be in the corporation's best interest?

2. Should this Court grant certiorari to review whether the district court abused its discretion in determining that, on the facts of this case, petitioners' application for intervention was untimely?

STATEMENT

The petitioners for intervention first became stockholders of Alleghany in August of 1955 (14a, 17a).* They claim to have followed the fortunes of this litigation closely for some time (App. 19, 33-34).**

Litigation with respect to the matters at bar began in 1954 with the commencement of a stockholders' derivative action, *Zenn* v. *Anzalone*, in the New York State Supreme Court. That litigation culminated in a court-approved settlement in 1959 and the final entry of judgment in the spring of 1960.

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* Numbers in parenthesis followed by lower case "a" refer to the appendix in petitioners' brief on appeal to the Second Circuit on their application for intervention.

Numbers in parenthesis preceded by "App." refer to the appendix in respondent Alleghany's brief to the Second Circuit on intervention.

Numbers in parenthesis preceded by "Pet." refer to page references in the petition before this Court.

** The court of appeals noted below that "the sophisticated applicants for intervention concededly followed the fortunes or ill fortunes of the Alleghany Corporation through this litigation with pretty close attention" (Pet., p. 5a).

That judgment, however, was not long at rest. In September 1960 two of the defendants in *Zenn*, the Murchison brothers, who had had a falling out with Kirby over control of Investors Diversified Services, Inc. (IDS), which the settlement required them to return to Alleghany, commenced a proxy fight against Kirby for control of Alleghany in order to regain control of IDS for themselves. Simultaneously they brought the instant action, as stockholder-plaintiffs, to set aside the judgment and settlement in *Zenn* as to Kirby only. Their counsel was the firm of Townley, Updike, Carter & Rodgers, which has since become petitioners' counsel (218 F. Supp. at 167).

The Murchisons were successful in their proxy fight and gained control of Alleghany in May 1961. Thereupon the Murchisons caused the corporation to take over their lawsuit and to retain the Townley, Updike firm as the corporation's counsel (218 F. Supp. at 167). After a trial in April 1963, the district court found that the plaintiff "completely and utterly failed to establish the causes of action which it [had] asserted" (218 F. Supp. 164). The Court of Appeals for the Second Circuit affirmed, Judge Friendly dissenting, on May 20, 1964 (333 F. 2d 327).

In the meantime, while the matter had been *sub judice*, Kirby regained control of Alleghany in December 1963, since which time Alleghany's Board has consisted of thirteen directors, of whom three are respondents herein and one (Allan P. Kirby Jr.) is the son of a respondent. The nine remaining directors have represented independent owners of approximately 1,800,000 shares, or about 20%, of Alleghany's issued common stock, having a value of $20,000,000 (App. 6).

After the 2-to-1 decision of the Court of Appeals, Alleghany's Board requested the opinion of the Townley,

Updike firm as to what further steps, if any, should be taken in the litigation, and was advised to apply for a rehearing *en banc*. On June 9, 1964 the Board accepted this advice and unanimously voted to apply for rehearing (App. 23).

Rehearing was granted and on January 12, 1965, the Court of Appeals announced its affirmance of its prior decision by a split vote (4-4) (340 F.2d 310).

At this point, the nine independent directors decided to make a fresh appraisal of the situation for the purpose of determining whether continuation of this expensive and protracted litigation, in which the corporation had been consistently unsuccessful, was in the corporation's best interest. They turned to independent legal counsel and chose the law firm of Willkie Farr Gallagher Walton & FitzGibbon, New York City* (App. 3-4).

The Willkie firm advised the board that it considered "the case to involve primarily an evidentiary question of a nature in which the Supreme Court rarely grants certiorari" (App. 12). The Townley, Updike firm likewise advised the board that the chances of certiorari being granted were remote (App. 4).**.

The board was also faced with the prospect that in the unlikely event that certiorari should be granted and the decision of the Court of Appeals reversed, there was

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* The Willkie firm had previously been retained by Alleghany under Murchison management, but not in connection with the instant litigation (App. 3).

** The Townley, Updike firm, upon presentation of the instant petition to the district court, confirmed that advice, stating:

> "We were careful to point out that, in our judgment, a pretty big hurdle would have to be accomplished before the Supreme Court would grant that writ . . . .", and "As we told Alleghany, we have some doubts about our success in having the petition granted. But where there's life, there's hope" (App. 24, 36).

no assurance that the corporation would prevail upon a retrial, whereas there was the almost inevitable fact that further litigation would be protracted, expensive and demanding upon the time and energies of the management. In addition, the board was faced with the fact that both the district court and the Court of Appeals were unanimous in finding that no fraud or dereliction had been made out against Kirby or the other defendants in this action, and the further fact that even if the corporation should, upon a retrial, succeed in obtaining a rescission of the *Zenn* settlement, this might result in the loss of Alleghany's control of IDS, which had been valued by the plaintiffs in *Zenn* at many millons of dollars (App. 4-6).*

At a meeting of the Alleghany board on February 9, 1965, from which Kirby, Ireland, Fred M. Kirby and Allan P. Kirby, Jr. absented themselves, the nine disinterested directors voted unanimously (one director abstaining for personal reasons) not to prosecute the litigation any further (App. 4). The Board concluded

> "that the prospects for ultimate benefit to Alleghany by pursuing this litigation were uncertain at best and the detriment to Alleghany in doing so was real and substantial. On this basis the directors exercised their business judgment and voted to discontinue the lawsuit" (Affidavit of James W. Deer, App. 6).

On the same date this decision, and the reasons for it, were communicated to petitioners' counsel, the Townley, Updike firm (App. 25).

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* The settlement in *Zenn* resulted in a cash payment to Alleghany of $3,000,000 and return of control to it of IDS, in which Alleghany had its major investment. The return of control of IDS had been valued by the plaintiffs in *Zenn* at up to $19,000,000.

The independence of the Alleghany directors who voted against further litigation is summarized in the affidavit of one of them, James W. Deer, a member of the Bar of the State of New York, as follows:

> "None of the directors who voted not to authorize Mr. Updike to seek to continue the litigation is under Kirby domination or associated with him as employee, supplier, etc. They all have a large financial stake in Alleghany and exercised their judgment as to how best to protect it. They represent on Alleghany's board almost 20% of Alleghany's outstanding stock, which is owned by companies of which they are themselves directors or officers. Mr. Lincoln represents the Nationwide Insurance Companies on the Alleghany Board. The Nationwide Companies own in the aggregate approximately 789,000 shares of Alleghany common stock plus 9,200 shares of preferred and 85,100 warrants. Mr. Odell represents Allied Properties, of which he is chief stockholder and which owns 450,000 shares of Alleghany common stock. Mr. Hunt represents Coral Ridge Properties, Inc., of which he is principal stockholder and which owns in excess of 100,000 shares of Alleghany common stock. Each of the other directors has a substantial personal Alleghany holding. I represent Gamble-Skogmo, Inc., which owns 500,000 shares of Alleghany common stock" (App. 6).

Petitioners took no steps to inquire as to the board's decision until, on Sunday, April 4, 1965, they learned of it in a conversation with one of the attorneys of the Townley, Updike firm, Richard J. Barnes, who had appeared as of counsel for Alleghany in the petition to the Second Circuit for the *en banc* rehearing (App. 19). On April 8, 1965, four days before the expiration of the 90-day

period within which a petition for writ of certiorari might be made, petitioners obtained from the district court an order to show cause returnable the next day, Friday, April 9, for the purpose of seeking intervention to petition for certiorari on the following Monday's deadline (5a).

On April 9, 1965, petitioners' application was heard by the district court (Ryan, Ch. J.). At this hearing, petitioners' counsel, the Townley, Updike firm, stated that they did not question the integrity of the independent board members in reaching their decision (App. 43). Nor did petitioners' counsel suggest that these members were dominated or influenced in any way by respondents (Pet. app. 7a). After reviewing the record and hearing counsel at length, Judge Ryan ruled:

> "I find and conclude that the within application is not timely made and that the applicants have had and do have adequate representation" (App. 46).

Petitioners appealed to the Second Circuit. Upon argument of the appeal their counsel, the Townley, Updike firm, "expressly refused to characterize the board as 'dominated' by the Kirby group" but for the first time referred to the "brooding presence" of Kirby without further elaboration and without reference to a single fact or piece of evidence, in or out of the record, to support such characterization (Pet. app. 7a).

ARGUMENT

Point I

Since Petitioners Were Honestly and Adequately Represented the Petition Fails to Present any Questions for Review by this Court.

The petition presents nothing more than a belated disagreement between two stockholders of a corporation and the disinterested majority (and quorum) of the Board with respect to corporate action taken in good faith, for valid business reasons, and believed to be in the best interests of the corporation. No facts have been offered to support any claim of domination or bad faith. On the contrary, petitioners have conceded that the disinterested directors were not under respondents' domination.

The directors' belief that their action was in the corporation's best interests and the lack of any motive on their part to follow the dictates or interests of the respondents is further evidenced by the fact that if petitioners' visions of ultimate success were realized the stock represented by these directors would stand to appreciate by about $10,800,000 in value*.

Where the corporation has been honestly represented by competent and disinterested directors, Rule 24(a)(2) does not entitle the individuals whose interests were thus represented to intervene for the purpose of superimpos-

* This is roughly $6.00 per share of common or $3,000,000 for Gamble-Skogmo represented by Mr. Deer; over $4,500,000 for Nationwide, represented by Mr. Lincoln; over $2,500,000 for Allied Properties in which Mr. Odell and his family own over 35% of the common; and $600,000 for Coral Ridge Properties in which Mr. Hunt and his family own over 50% of the Class A and of the Class B common (App. 6).

ing their own views on the board. *Sam Fox Pub. Co.* v. *United States,* 366 U. S. 683, 692 n. 4 (1961).

No conflict exists between the decision of the Court of Appeals here and the decisions of other federal circuits relied upon by petitioners (Pet., pp. 10-12). In *Pellegrino* v. *Nesbit,* 203 F. 2d 463 (9th Cir. 1953), *Molybdenum Corp. of America* v. *International Mining Corp.,* 32 F.R.D. 415 (S.D.N.Y. 1963); *Park & Tilford Inc.* v. *Schulte,* 160 F. 2d 984 (2nd Cir.), cert. denied 332 U. S. 761 (1947) and *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D.C. Cir.) cert. denied 323 U. S. 777 (1944) the intervenor was asserting an independently-created primary right, as distinguished from the derivative right asserted here, and hence was not bound by the decision of the Board as his representative. In *Atlantic Refining Co.* v. *Standard Oil Co.,* 304 F. 2d 387 (D.C. Cir. 1962) the petition was not opposed by the United States, the party on whose behalf the petitioner there sought to intervene.

Point II

Petitioners' Application Was Untimely

Petitioners' belated application for intervention, filed four days before expiration of the time to petition for certiorari in the main case, is untimely. Judge Ryan did not abuse his discretion in so ruling. It came, some 16 months after petitioners, who followed the affairs of Alleghany closely, learned of the well-publicized return to the Alleghany board of what their counsel (then Alleghany's counsel) now chooses to describe as the "brooding presence" of Kirby.

In all that time they did not seek to intervene after Kirby regained control of Alleghany in December 1963. Even after the original 2-to-1 decision of the Court of Appeals was announced on May 20, 1964, they expressed no desire to intervene, or to inquire as to the board's further intentions, even though Kirby had occupied the same position on the Alleghany board for more than six months. They were not heard from either before or after June 23, 1964, when the corporation, at the direction of the board of directors, applied for rehearing *en banc* before the Second Circuit. Nor were they sufficiently concerned to inquire as to the board's further intentions after the Court of Appeals *en banc* announced its reaffirmance of Judge Dawson's decision on January 12, 1965.

Petitioners were not prompted to make their decision until a few days before time to apply for certiorari expired, when they discussed the matter with one of the attorneys from the law firm which has managed this lawsuit throughout.

In light of the circumstances reflected in the record, there can be no question but that Judge Ryan properly exercised his discretion in ruling that petitioners' application was untimely.

Conclusion

For the reasons stated above, the petition for a writ of certiorari to the Court of Appeals for the Second Circuit to review the affirmance by that court of the district court's denial of petitioners' application for leave to intervene should be denied.

Respectfully submitted,

WALTER R. MANSFIELD,
Counsel for Respondents, Allan P. Kirby, Charles T. Ireland, Jr. and Fred M. Kirby.

WALTER L. STRATTON,
BEN VINAR,
JOHN J. MCCANN,
DONOVAN LEISURE NEWTON & IRVINE.

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v.

ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW INTERVENTION DECISION.

MARK F. HUGHES,
Attorney for Respondent Alleghany Corporation,
1 Chase Manhattan Plaza,
New York, N. Y. 10005.

ALLAN F. CONWILL,
VINCENT R. FITZPATRICK,
ANTHONY F. PHILLIPS.

May 24, 1965.

Pandick Press, Inc., 22 Thames St., New York, N. Y. 10006. U. S. A.

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ALLEGHANY CORPORATION, ALLAN P. KIRBY, CHARLES T. IRELAND, JR., and FRED M. KIRBY,

Respondents.

BRIEF OF RESPONDENT ALLEGHANY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW INTERVENTION DECISION.*

Margaret L. Holt and Kathleen L. McMahon, preferred stockholders of respondent Alleghany Corporation (hereinafter "Alleghany"), petition for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit which affirmed an order of the United States District Court for the Southern District of New York (Ryan,

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*References to petitioners' appendices in their petition herein will be as follows: (1a) etc. References to our own appendix will be (App. p.). For convenience, we have reprinted the appendix to our brief in the Court of Appeals as an appendix to this brief.

Ch. J.) denying their application for leave to intervene in the action as of right pursuant to FRCP 24(a)(2) for the purpose of filing a petition for certiorari in this Court to review an affirmance by the same Court of Appeals of the judgment of the same District Court dismissing the action after trial (Dawson, J.).

Questions Presented.

1. Where an independent board of directors, whose integrity and good faith are admitted, has determined that it is in the best interests of the corporation not to apply to this Court for a writ of certiorari to review a judgment dismissing an action charging that certain other directors and officers had procured a settlement of a stockholders' action by fraud, may two preferred stockholders intervene as of right under FRCP 24(a)(2) for the purpose of filing such a petition?

2. Where the stockholders seeking intervention are admittedly "knowledgeable" and have followed this litigation with "close attention" and where the attorneys who represent them were expressly advised of the decision of the board of directors not to apply for a writ 62 days prior to the expiration of the time to make such an application, is a motion to intervene for the purpose of making such an application timely, when made 4 days before such expiration date?

The part of Rule 24(a)(2) upon which the petitioners rely is as follows:

> "(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *."

Preliminary Statement.

When this action was commenced in 1960 in the United States District Court for the Southern District of New York as a derivative stockholders' action in the right of Alleghany, the plaintiffs were John D. Murchison and Clint W. Murchison, Jr.* The defendants were the present respondents, Allan P. Kirby, Charles T. Ireland, Jr., and Fred M. Kirby, together with one Randolph Phillips who is no longer in the case.** At that time the Murchisons were in a bitter fight with the respondent Allan P. Kirby for control of the respondent Alleghany and the litigation was "but another skirmish in the battle of tycoons for control of" that "rich plum" (218 F. Supp. 167). The attorneys for the Murchisons are the same attorneys who now represent the two lady petitioners.

The complaint in this action charged that the individual respondents had procured the settlement of consolidated stockholders' actions pending in Supreme Court, New York County, by fraud (218 F. Supp. 164). The complaints in those New York actions related to transactions dating back to 1949 and 1950. The settlement occurred in 1959. Under its terms Alleghany has been paid $3,300,000 and the voting stock of Investors Diversified Services, Inc., (hereinafter "IDS") which the Murchisons then owned, was exchanged for non-voting stock of IDS. This gave Alleghany voting control of IDS, the value of which has been assessed at various figures running into the millions (App. p. 5).***

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* Petitioners state that *Holt* v. *Kirby* was commenced in the Southern District of New York on September 8, 1960 (Petition, p. 3). This, of course, is not the fact. *Murchison* v. *Kirby* was commenced then; *Holt* v. *Kirby* was commenced last month, viz., April, 1965.

** The judgment of dismissal as to him was not appealed from.

*** Judge Dawson's Opinion in the District Court traces the history of the negotiations culminating in this settlement in great detail at 218 F. Supp. 172-178.